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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/614,947	07/08/2003	Raymon W. Lush		7123

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EXAMINER

ABBOTT, YVONNE RENEE

ART UNIT PAPER NUMBER

3644

DATE MAILED: 09/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/614,947

Applicant(s)

LUSH, RAYMON W.

Examiner

Yvonne R. Abbott

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 17 June 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

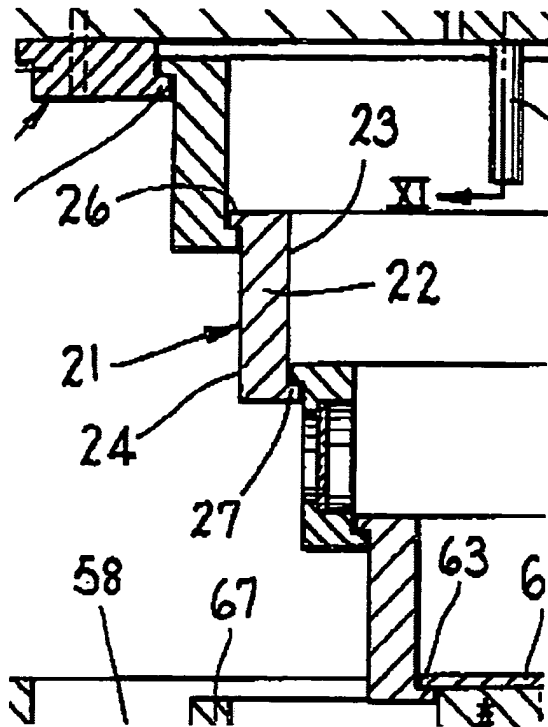
## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

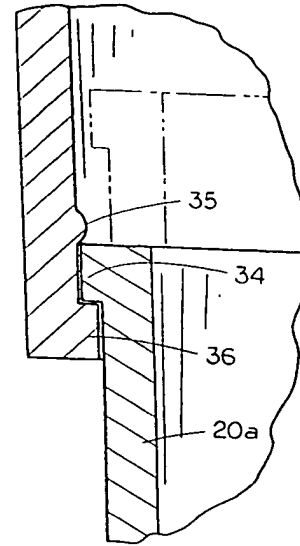
**DETAILED ACTION**

***Response to Arguments***

1. Applicant's arguments filed 6/17/04 have been fully considered but they are not persuasive. Applicant asserts that the Podjan prior art reference numbers 26 and 27 of Podjan are flanges that support one ring upon another in a step-like fashion so that the rings do not slip past one another, and that a selective locking structure which yieldably maintains the feeder body in an extended position is not shown (Applicant's Remarks, pp. 6-7). However, it is maintained that Podjan discloses this structure inasmuch as this structure is disclosed by Applicant. (see Applicant's spec. p. 7, lines 1-6 where it recites "In Figure 2, the lowermost segment or ring 20a has a shoulder 34 which extends outwardly therefrom. The next segment or ring 20b has a lower shoulder 36 which the interior surface of segment or ring extends inwardly therefrom, as seen in Figure 2, 20a has a plurality of spaced-apart raised lips or protrusions 35 extending inwardly therefrom which are positioned immediately above shoulder 34 when shoulders 34 and 36 are in abutting engagement, as seen in Figure 2." Both Podjan and claimed invention disclose stepped flanges in abutting engagement, and since the structure is disclosed by Podjan, it is considered capable of locking and yieldably maintaining an extended position inasmuch as Applicant's invention. See Podjan's stepped locking structure on left and Applicant's on the right.



Podjan



Claimed invention

2. It should also be noted that with respect to the previous application of the Lush ('629) patent in the rejection in the Office Action of 5/14/04, the filing date of the present application would require double patenting rejection as opposed to a straight § 103(a) rejection. The substantive nature of the rejection has not changed, only the form and the requirement for a terminal disclaimer. Since it is Applicant's own Patent, this requirement should not be considered unexpected.

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

5. Claims 1, 3-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Podjan (4,204,500) in view of Lush (6,073,582). Podjan shows a bird feeder comprising a collapsible metal feeder body, selectively movable between collapsed and extended positions, having upper and lower ends, comprising a base (12) and rim (57), a series of hollow body square-shaped segments (16,17,18,19) of graduated diameters which are extendible to form a feeder body, the segment of smallest diameter (19) being joined to said base (12) by mounting plate (59), the other segments being collapsible around the segment of smallest diameter inwardly of said rim; the segment of smallest diameter having feed outlets (66) formed therein whereby feed in the feeder body may pass outwardly through said feed outlets onto said base inwardly of said rim, a hanger (52,53) secured to the segment of greatest diameter, and said feeder segments including selective locking structure, said selective locking structure yieldably maintaining said feeder body in its said extended position; wherein the segment of greatest diameter includes an outwardly extending roof with a selectively removable cover (42,43) mounted thereon; additionally, with respect to claims 4 and 6, Podjan teaches that the segments can be rectangular if desired or made of plastic (col. 5, lines 18-28). Although the hanger of Podjan is not shown to be pivotally secured to the segment of greatest diameter, Lush teaches a hanger (26) which is removably pivotally secured to the top segment of a collapsible feeder. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide that the hanger of Podjan is pivotally attached to provide a more level and stable hanging

structure. With respect to claim 7, it would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the feeder of glass material since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416. As to claim 9, to provide that the roof extends downward would have been obvious to one skilled in the art wishing to provide an awning or protective cover to the feed from rain, and the like.

6. Claims 1, 6, 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Runyon et al. (5,975,015) in view of Lush ('582). Runyon et al. show a plastic feeder comprising a collapsible feeder body, selectively movable between collapsed and extended positions, having upper and lower ends, comprising a base (28) and a rim, a series of hollow body segments of graduated diameters which are extendible to form a feeder body, the segment of smallest diameter being joined to said base, the other segments being collapsible around the segment of smallest diameter inwardly of said rim (Fig. 1); the segment of smallest diameter having feed outlets (26b) formed therein whereby feed in the feeder body may pass outwardly through said feed outlets onto said base inwardly of said rim, and said feeder segments including selective locking structure (Fig. 6) on the segments comprised of cooperating beveled flanges (38), detents (62), and edge surfaces (44,76) of upper and lower members, said selective locking structure yieldably maintaining said feeder body in its said extended position; and Although Runyon does not show a hanger e pivotally secured to the top segment or

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segment of greatest diameter, Lush teaches a hanger (26) which is removably pivotally secured to the top of a collapsible feeder. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide that the hanger of Podjan is pivotally attached to provide a stable means of attaching the feeder to more locations.

### ***Double Patenting***

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

8. Claims 1-8, 10, 11 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-8 of U.S. Patent No. 6,427,629 in view of Podjan ('500). Lush ('629) shows a bird feeder comprising a collapsible feeder body, selectively movable between collapsed and extended positions, having upper and lower ends, comprising a base (16) and a rim (18), a series of hollow body annular-shaped segments (20) of graduated diameters which are extendible to form a feeder body, the segment of smallest diameter being joined to said base, the

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other segments being collapsible around the segment of smallest diameter inwardly of said rim; the segment of smallest diameter having feed outlets (32) formed therein whereby feed in the feeder body may pass outwardly through said feed outlets onto said base inwardly of said rim, a removable hanger (22) pivotally secured to the segment of greatest diameter; wherein the segments are annular, square, or rectangular shaped, and the feeder is made of metal, plastic or glass (col. 3, lines 30-35). Lush, however, does not show that said feeder segments include a selective locking structure, said selective locking structure yieldably maintaining said feeder body in its said extended position. Podjan ('500) teaches a collapsible bird feeder having a selective locking structure comprised of cooperating flanges (26,27), said selective locking structure yieldably maintaining said feeder body in its said extended position; alternatively the feeder can be mounted on a post or similar structure such that a suitable retaining rod is extended vertically between the top and base structures, one or more rods can be disposed at the corners of the feeder externally of the sidewall, or inside the sidewall structure (col. 5, lines 3-15). It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide that the Lush collapsible feeder be selectively lockable in an extended position as taught by Podjan if one wished the feeder to remain in the extended position even when not supported by the hanger (i.e. if one wished the feeder to stand on its own).



***Conclusion***

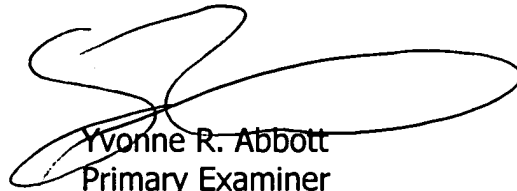
9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Yvonne R. Abbott whose telephone number is (703)308-2866. The examiner can normally be reached on Mon-Thurs 9:30am-6:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Teri Luu can be reached on (703)305-7421. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Yvonne R. Abbott  
Primary Examiner  
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